KUALA LUMPUR INDUSTRIES BHD. & ORS., RE

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. D3-24-277-1989]
28 NOVEMBER 1989

COMPANY LAW: *Whether Court had power to make order under s. 176(10) in the absence of an application under s. 176(1) - Anyone can make a s. 176(1) proposal - Proposal need not be put to company or creditors - Need not be complete - Persons who can move the Court for a restraining order - The policy of the section - Compromise and arrangement has to be between parties - Sufficient particulars to enable Court to make decision - Feasibility and merits - Bona fide - Whether proposal within meaning of s. 176(1) - Companies Act 1965, ss. 176(1), (10).*

Kuala Lumpur Industries Bhd. Group of Companies (the group) obtained an order of Court under s. 176(1) of the Companies Act 1965 (the Act) restraining the plaintiffs from proceeding against one or more of the members of the group except with leave of the Court. The order was obtained on 7 October 1989 and was to be effective for a period of 2 months from that date.

It was envisaged that an order of Court under s. 176(1) ordering a meeting of creditors to arrange a compromise between the creditors or any class of them or between the company and its members or any class of them would have been obtained within the 2 month period. No such application was filed.

MBF Finance Bhd. (MBF), was one of the plaintiffs affected by the s. 176(10) order. MBF was granted leave to intervene to move the Court to set aside the order of 7 October 1989 on the ground that the Court did not have the jurisdiction to make the order arguing that a s. 176(10) application cannot be made without there being a s. 176(1) application, and that in any event the order should not have been made unless there has been proposed a scheme of compromise or arrangement between the company and its creditors.

Held:

[1] A proposal of compromise or arrangement envisaged in s. 176 could come into existence and be recognised as such without it having been put to the company or to the creditors. The proposal under s. 176(1) can emanate from anybody and there is nothing to prevent some of the creditors, or any interested party, from coming up with a proposal without referring it to the company and one or more of them taking out the s. 176(1) application.

[2] It is the compromise or arrangement that is between the company and its creditors or between the company and its members. The proposal for such compromise or arrangement itself is not necessarily between anybody, as it could be unilateral. However, it is only the persons specified in the subsections of s. 176(1) that may move the Court for a Court sanctioned meeting.

[3] For there to be a proposal within the meaning of s. 176, it is not necessary that there should be a scheme in a complete form capable of being presented to the creditors for being voted on.

[4] Where there is such a proposal, and even before it is put to anybody, the company or any member or creditor of the company may move the Court for a restraining order pursuant to s. 176(10). The policy of the section is not such that a s. 176(10) application has to be tagged on to a s. 176(1) application. The two may be brought independent of the other.

[5] When considering a s. 176(10) application, the Court must have before it a proposal of a scheme of compromise or arrangement not necessarily ready for presenting to the creditors to be voted upon but with sufficient particulars to enable the Court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. The Court also has to be satisfied that there is a *bona fide* application under s. 176(1).

[6] It has to be assumed in this case that the Court that granted the *ex parte* restraining order was satisfied that there was a proposal within the meaning of s. 176, that the scheme, the subject matter of the proposal was feasible and merited presentation for the consideration of the creditors and that the intention was that there would be a *bona fide* s. 176(1) application.

[7] On the facts, there was in existence a proposal, the particulars of the scheme as exhibited give more than a general layout of the scheme sufficient for the Court to consider whether it is feasible, and that the intention to use s. 176(1) is *bona fide.*

[8] The complaint that the intention of the applicant in taking out the application was to forestall the winding up of a hopelessly insolvent company does not take the matter anywhere since the whole point of s. 176 is to provide a statutory remedy to sort out the problems of ailing companies without letting them go under.

[Application to set aside the ex parte order dismissed with costs.]

Cases referred to:
Re Clements Langford Pty. Ltd. [1961] VR 453 ***(foll)***
Re G.A.E. Pty. Ltd. [1902] VR 252 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 176(1), (10)
Companies Act [Aust], s. 90(1), (6), 91(1)

For the applicant - S.C. Loh , (Nik Aliena Salwanee with him); M/s. Cheang & Ariff
For the respondent - Jaspal Singh, (Albar Zulkifly & Yap with him)

JUDGMENT

VC George J:

On 7 October 1989 by an *ex parte* originating summons the Kuala Lumpur Industries Bhd., Group of Companies (the group) obtained a s. 176(10) (of the Companies Act 1965) order whereby the plaintiffs in a number of pending proceedings against one or more of the members of the group were restrained except by leave of the Court from all further action or further proceedings against the members of the group the restraining order to be effective for a period of 2 months from the 7 October 1989.

It would appear that it was envisaged that a s. 176(1) (of the Companies Act 1965) order would within that 2 months be obtained. On 7 October a s. 176(1) application had not been filed.

MBF Finance Bhd. (MBF), is one such plaintiffs affected by the order of 7 October. On 2 November it filed its application encl. (9) in the Court file seeking to be given leave to intervene in the originating summons to move the Court to set aside the order of 7 October on the ground that the Court did not have the jurisdiction to make the order and that in any event the order should not have been made. Leave to intervene was given and I thereafter directed my mind to the application to set aside the order of 7 October.

The said two subsections of the Companies Act 1965 are as follows:

> 176(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.
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> 176(10) Where no order has been made or resolution passed for the winding up of a company and any such compromise of arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceedings against the company except by leave of the Court and subject to such terms as the Court imposes.

On the jurisdictional point MBF's contention is that without there being a s. 176(1) application the Court has no jurisdiction to make a s. 176 (10) order. In any event unless there has been proposed a scheme of compromise or arrangement between the company and its creditors the Court has no jurisdiction to make a s. 176(10) order.

It is contended that there has been no such proposal. Mr. Song Soon Ong the senior manager of MBF in his affidavit in support of the application contends *inter alia* that there had not been any proposal of any scheme of compromise or arrangement made to any of the creditors and further what is exhibited as a scheme is not a scheme in which the general principles of it have been defined and as such and that in any event the scheme had not reached a stage where the Court would be justified in making a s. 176(1) order. He goes on to contend that the scheme the group has in mind is bound to fail. He questions the *bona fides* of the application suggesting that it was filed for a collateral purpose: to forestall the winding up of a hopelessly insolvent company.

I pause to note that in England they do not have the equivalent of our s. 176(10). The Indian equivalent is not in *pari materia* with ours. In India it is expressly provided that the equivalent of a s. 176(10) application may be brought only after there comes into existence a s. 176(1) application. The Australian Act has provisions equivalent to our s. 176 in respect of which there has been judicial pronouncements.

Now it is to be noted that the proposal envisaged in s. 176 is not necessarily a proposal from the company to its members or to the creditors. The proposal could emanate from anybody - not only from the company and/or its board or its members but even from the creditors (as happened in *Re Clements Langford Pty. Ltd.* [1961] VR 453 where the proposal appeared to have emanated from a committee made up of some of the creditors of the company in difficulty) or from some other interested party for example the auditors, a merchant bank looking into the affairs of the company, solicitors of the company, solicitors of one or more of the creditors, accountants and so on. In my view such a proposal of compromise or arrangement could come into existence and be recognised as such without having been put to the company or to the creditors. For instance, there is nothing in the way of some of the creditors coming up with a proposal without even referring it to the company and one or more of them taking out the s. 176(1) application which it is to be noted a creditor is entitled to make. It is the compromise or arrangement that is between the company and its creditors or between the company and its members. The proposal for such compromise or arrangement itself is not necessarily between anybody. It could be unilateral. For example a merchant bank having studied the problems of a company could come up with a proposal that a

compromise or arrangement be arrived at between the company and its creditors. But it has to leave it to the company or to the creditors (or any one of the creditors) or a member of the company to invoke s. 176(1) in that while anybody could make such a s. 176(1) proposal it is only the persons or parties prescribed in the subsections that may move the Court for a Court sanctioned meeting that is the company or any creditor or member of the company or in the case of a company being wound up, the liquidator.

For there to be a proposal within the meaning of s. 176 it is not necessary that there should be a scheme in complete form capable of being presented to the creditors for being voted on. With respect I share the views of Sholl J expressed in *Re G.A.E. Pty. Ltd.* [1902] VR 252 where at p. 256 he says:

> (4) It is not necessary to have the scheme in a complete form, capable of being at once sent out with notices of meetings and with the statement required by s. 91(1) with a view to its being actually voted on at a meeting or with a view to proxies being appointed for the meeting. If it were to be held that preparation to that point was essential, the purpose of s. 90(6) would in my judgment be substantially defeated. Once it becomes known or suspected among creditors that a compromise or scheme of arrangement is to be proposed, there is a risk of some creditors rushing in an attempt to obtain a preference by the completion of execution. If in those circumstances the company and the rest of the creditors had to wait until there was time to prepare a full scheme, ready in all details to send out for the purpose of consideration at a meeting or meetings ordered by the Court, the desire of the Legislature to protect the assets pending the possible adoption of the scheme would be defeated. I would point out, incidentally, that s. 91(1) is capable of being satisfied after a Court order for meetings, so that an order under s. 90(1) can be made before the scheme is finalised in its ultimate detail, so long there is a scheme which 'is proposed'.
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> (5) There must, however, be at least a scheme the general principles of which have been defined, and which, though it may need completion by the addition of details such as schedules of creditors and their debts, is nevertheless at a stage at which the Court would be justified in ordering a meeting of creditors. There must be, in my opinion, a scheme prepared to that point, before the Court can convene meetings or order a stay ...

And where there is such a proposal and even before it is put to anybody, the company or any member or creditor of the company may move the Court for a restraining order pursuant to s. 176(10). In my judgment the policy of the section is not such that a s. 176(10) application has to be tagged on to a s. 176(1) application. The two may be brought independent of the other. This view of the matter I think is shared by Sholl J, Adam J and Little J of the Supreme Court of Victoria. In *G.A.E. Pty Ltd. (supra)* at p. 254 where he talks of there having to be a definite scheme and goes on to deal with the question of ordering a stay of proceedings, Sholl J goes on to say:

> However, I understand from his Honour (Adam J) that the general effect of his decisions was that he declined to hold that a scheme or arrangement 'has been proposed', within the meaning of subsection (6), when all that had taken place was of such an indefinite nature that it could merely be said it was proposed to make a proposal. In other words, he required that there should be something in the way of a definite scheme for consideration. On the other hand, he took the view, with which I respectfully agree, that it was unnecessary to show that meeting had already been called, or even that the scheme had reached such a detailed state of preparation that it could go out there and then for consideration by a meeting of creditors. He took the view, with which again I agree, that the value of the subsection would be substantially lessened if one required preparation of a fully detailed scheme, so that no stay could be applied for unless and until the Court had summoned meetings or was at the same moment proceeding to do so. Adam J's decision in *Re Clements Langford Pty. Ltd.* (unreported) was referred to by Little J, in a recent decision of his own *Re Clements Langford Pty. Ltd.* (*supra*) where in

the light of further events, he granted the stay of execution which Adam J had refused in the case of the same company 13 days earlier. In that case, it appears from Little J decision that before Adam J refused the stay on the ground that no scheme of arrangement or compromise had been proposed within the meaning of the subsection, four events had taken place, and it was because of the occurrence of a fifth and additional event that Little J held that there had been a proposal which attracted his jurisdiction to stay execution.

In my view what must be available to the Court when considering a s. 176(10) application must be a proposal of a scheme of compromise or arrangement not necessarily ready for presenting to the creditors to be voted upon but with sufficient particulars to enable the Court to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. Further the Court has to be satisfied that there is or that there would be a *bona fide* s. 176(1) application.

In the instant case it has to be assumed that the Court that give the *ex parte* order was satisfied that there was a proposal within the meaning of s. 176, the scheme the subject matter of the proposal is feasible and merits presentation for the consideration of the creditors and that the intention is that there would be a *bona fide* s. 176(1) application made. It is to be noted that the restraining order made is not absolute. With the leave of the Court proceedings may be commenced or continued with. Also a time limit has been imposed. The restraints are to obtain for two months from 7 October 1989.

In any event I am also satisfied that:

(1) there had come into existence a proposal;

(2) the particulars of the scheme as exhibited give more than a general layout of the scheme sufficient for the Court to consider whether it is feasible. No doubt when it is sought to be presented to a Court sanctioned meeting of creditors the applicants will no doubt have to satisfy the meeting that the consents and undertakings of various persons necessary for the implementation of the scheme are available and parties necessary to the implementation of the scheme have contractually bound themselves to a participation as required in the implementation. However in the meantime in my view what is available is sufficient for the Court to find that the scheme is feasible. I fail to see that it is not feasible.

(3) the intention to use s. 176 is *bona fide*. The proposed scheme involved a significant participation by Bee Hin Group of Companies. The memorandum of understanding executed by Dato Teong Teck Leong on behalf of the Bee Hin Group of Companies and by Dato' Wong Kee Tat on behalf of Kuala Lumpur Industries Bhd., Group of Companies exhibited to the supporting affidavit encl. (2) in the Court file and that merchant bankers have been commissioned and appear to have directed their minds to putting up the scheme are matters that are consistent with the *bona fides* of the matter.

The complaint that the intention of the applicant in taking out the application was to forestall the winding up of a hopelessly insolvent company does not take the matter anywhere since the whole point of s. 176 is to provide a statutory remedy to sort out the problems of ailing companies without letting them go under.

The application encl. (9) to set aside the *ex parte* order of 7 October 1989 is dismissed with costs.

Also found at [1991] 3 CLJ 2867